



# Tobacco Laws

## Affecting California

### **2013 Supplement**

For use with the 2012 edition of  
*Tobacco Laws Affecting California*

**ChangeLab Solutions**  
[www.changelabsolutions.org/tobaccoquestions](http://www.changelabsolutions.org/tobaccoquestions)

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## INTRODUCTION

### OVERVIEW

In the past 12 months, several laws were adopted at the state and federal levels that affect how tobacco is used, sold, or otherwise regulated in California. This supplement summarizes the tobacco-related laws that were passed after the release of the 2012 version of ChangeLab Solutions' booklet *Tobacco Laws Affecting California*.

This supplement should be used hand in hand with the 2012 version of *Tobacco Laws Affecting California*. It is organized so that readers can track those entries in the earlier booklet that have been updated. The information in this supplement includes tobacco-related laws that are effective as of May 1, 2013.

This supplement does not contain information on the numerous *local* laws in California that regulate tobacco use, sales, or distribution. Many of these local laws are stricter than state or federal law. For example, local governments in California have passed laws to limit exposure to secondhand smoke in both indoor and outdoor areas where smoking is permitted by state law. Local governments in California also have enacted laws to supplement state laws regarding how tobacco products are sold. For instance, the state tobacco retailer licensing law focuses on protecting state revenue by targeting tax evasion, while numerous communities have local tobacco retailer licensing laws that focus on protecting the public's health.

It is important to review local laws to determine whether a jurisdiction has adopted restrictions to supplement the laws described in this document and *Tobacco Laws Affecting California*.

### DISCLAIMERS

This supplement is provided for general information only and is not offered or intended as legal advice. ChangeLab Solutions and its projects do not enter into attorney-client relationships. Readers should seek the advice of an attorney when confronted with legal issues, and attorneys should perform an independent evaluation of the issues raised in these materials. If you notice any inaccuracies or misstatements, please contact us by completing the form at [www.changelabsolutions.org/tobaccoquestions](http://www.changelabsolutions.org/tobaccoquestions).

## FINDING THE ACTUAL LAWS

The full text of the laws and regulations described in this supplement can be found on the following websites:

- **California Laws**

<http://leginfo.legislature.ca.gov/faces/codes.xhtml>

To locate a particular code section, click on the link for the type of code (e.g., Business and Professions Code). You can also select the "Text Search" tab and search by keyword.

- **Federal Laws**

<http://uscode.house.gov/search/criteria.shtml>

This website contains the full text of the federal laws (the United States Code). To pinpoint a particular federal law, you can search by several methods, including keyword, title, and section.

- **Federal Regulations**

[www.gpo.gov/fdsys/browse/collectionCfr.action?collectionCode=CFR](http://www.gpo.gov/fdsys/browse/collectionCfr.action?collectionCode=CFR)

This website provides access to the Code of Federal Regulations (C.F.R.).

- **Food and Drug Administration Guidance, Compliance and Regulatory Information**

[www.fda.gov/tobaccoProducts/guidancecomplianceregulatoryInformation/default.htm](http://www.fda.gov/tobaccoProducts/guidancecomplianceregulatoryInformation/default.htm)

This website provides access to Food and Drug Administration guidance and compliance information on the 2009 federal Family Smoking Prevention and Tobacco Control Act.

**CHANGES TO EXISTING ENTRIES IN THE 2012 BOOKLET**

Changes to Entry 13  
**(YOUTH PURCHASE AND POSSESSION)**

Entry 13 summarizes the state law making it unlawful for a minor to purchase, receive, or possess any tobacco product or paraphernalia.

Assembly Bill 1301 amended Penal Code Section 308 to provide immunity from prosecution for youth decoys participating in certain enforcement actions. Penal Code Section 308(e) now provides immunity for a minor who purchases, receives, or possesses tobacco products or paraphernalia while participating in enforcement activities that comply with the STAKE Act guidelines.

Bill Number: AB 1301, 2011-2012 Session (Hill)

Citation: California Penal Code Section 308

Effective Date: January 1, 2013

Changes to Entries 23, 26, 30, 34, 37, 63, 67, 74, and 76  
**(PENALTIES: TOBACCO CONTROL ACT)**

Entries 23, 26, 30, 34, 37, 63, 67, 74, and 76 summarize penalties that may be levied against retailers who violate the federal Tobacco Control Act (TCA), including its provisions regarding sales to minors, self-service displays, minimum package sizes, advertising, and sampling.

On November 21, 2012, the federal Food and Drug Administration (FDA) issued guidance regarding TCA penalties. The guidance discusses the procedures that apply if the FDA seeks civil money penalties and the amount of the penalties that may be assessed. Additionally, if there is a “repeated violation” of the TCA, the FDA may impose a “no-tobacco-sale order” prohibiting the retailer from selling tobacco products for a specified period. The FDA interprets “repeated violation” to mean that there have been at least five violations of the TCA, each of the five violations represents the second or subsequent violation of a particular TCA requirement, and each of the five violations occurs within 36 months. The FDA states that it generally does not intend to seek a no-tobacco-sale order the first time an inspection identifies violations by a retailer and instead intends to send a warning letter.

Citation: Food and Drug Administration, Center for Tobacco Products, Civil Money Penalties and No-Tobacco-Sale Orders for Tobacco Retailers (Revised) (Nov. 2012), [www.fda.gov/TobaccoProducts/GuidanceComplianceRegulatoryInformation/ucm252810.htm](http://www.fda.gov/TobaccoProducts/GuidanceComplianceRegulatoryInformation/ucm252810.htm)

Changes to Entry 46  
**(BAN ON FLAVORED CIGARETTES)**

Entry 46 summarizes the federal law banning cigarettes containing certain characterizing flavors.

As of the date of this publication, courts in New York and Rhode Island have held that local governments may enact laws restricting the sale of flavored non-cigarette tobacco products, such as cigars and chewing tobacco. See *U.S. Smokeless Tobacco Mfr. Co. v. City of New York*, 708 F.3d 428 (2d Cir. 2013); *Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence*, No. 12-96 (D.R.I. Dec. 10, 2012), appeal docketed, No. 13-1053 (1st Cir. Jan. 10, 2013). Both courts found that the local laws were not preempted by the federal Tobacco Control Act. Tobacco manufacturers and distributors are currently appealing the Rhode Island decision.

These decisions are not binding on California but can be influential, and they signal that courts across the country are more likely to uphold similar laws in their jurisdictions.

Changes to Entry 51  
**(PREEMPTION OF STATE AND LOCAL REGULATION OF CIGARETTE ADVERTISING AND PROMOTION)**

Entry 51 summarizes the Federal Cigarette Labeling and Advertising Act (FCLAA), which prohibits state and local governments from imposing any requirements or prohibitions based on smoking and health with respect to advertising or promotion of cigarettes. The FCLAA allows state or local governments to impose bans or restrictions on the time, place, and manner, but not the content, of cigarette advertising or promotion. 15 United States Code Section 1334(c).

A federal court of appeals held that the FCLAA preempted a New York City law requiring tobacco retailers to display signs bearing graphic images showing adverse health effects of smoking. See *23-34 9th St. Grocery Corp.*

*v. N.Y.C. Bd. of Health*, 685 F.3d 174 (2d Cir. 2012). The court concluded that requiring graphic warnings to be placed adjacent to product displays impermissibly affected cigarette makers' promotions at retail sites. Although this decision is not binding in California, the case may serve as guidance for California courts examining similar issues.

By contrast, a federal trial court held that the FCLAA did not preempt a Providence, Rhode Island, law that prohibited tobacco retailers from accepting or redeeming coupons and multipack discounts for any tobacco products or cigarettes. See *Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence*, No. 12-96 (D.R.I. Dec. 10, 2012), appeal docketed, No. 13-1053 (1st Cir. Jan. 10, 2013). The court also held that the law did not conflict with the First Amendment rights of tobacco manufacturers or distributors, because it did not prohibit these parties from disseminating coupons or multipack offers. Tobacco manufacturers and distributors are appealing the decision.

### Changes to Entry 62

#### (CONTENT DISCLOSURES TO THE PUBLIC)

Entry 62 summarizes the requirement that the federal Food and Drug Administration (FDA) establish and share with the public a list of harmful and potentially harmful tobacco product constituents.

In April 2012, the FDA issued a notice establishing a list of tobacco product constituents that the agency currently believes are harmful or potentially harmful to health. The notice includes the criteria the FDA used to develop the list and the reasons the FDA may add or remove constituents from the list.

Citation: 77 Fed. Reg. 20,034 (Apr. 3, 2012)

Effective Date: April 3, 2012

### Changes to Entry 81

#### (CIGARETTE LABEL AND ADVERTISING WARNINGS: THE TOBACCO CONTROL ACT)

Entry 81 summarizes the federal requirements regarding warning labels that must appear on cigarette packages. The federal Food and Drug Administration (FDA) issued regulations in 2011 specifying that the warning labels would include nine specific graphic images and nine printed warnings depicting the negative consequences of smoking.

Two federal appellate courts issued conflicting rulings regarding the constitutionality of the graphic warning label requirement. One court held that the label requirement did not violate tobacco companies' First Amendment rights, finding that the graphic warnings were reasonably related to the government's interest in preventing consumer deception. See *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509 (6th Cir. 2012).

Another court held that the warning labels proposed by the FDA violated tobacco companies' First Amendment rights, finding that the government failed to show that the labels would lower smoking rates. See *RJ Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012). On March 14, 2013, the U.S. Department of Justice declined to appeal this ruling. The FDA has indicated that it will develop a second set of labels that will address the issues identified by the court. As a result, the agency has indefinitely postponed implementation of the graphic warning labels.

In another ruling involving the First Amendment, a federal trial court finalized the text of several corrective statements that tobacco companies will be required to publish in various media outlets. See *United States v. Philip Morris USA, Inc.*, No. 99-2496 (D.D.C. Nov. 27, 2012), appeal docketed, No. 13-5028 (D.C. Cir. Jan. 30, 2013). After years of litigation, the companies were ordered to publish the corrective statements after a court found that the companies deceived the public regarding the addictiveness and health effects of smoking. Examples of the statements include "Smoking is highly addictive" and "There is no safe cigarette." Finding that the corrective statements were factual and uncontroversial, the court rejected the companies' arguments that the statements violated their First Amendment rights. The companies are appealing the court's order.

### Changes to Entry 85 (FEDERAL TOBACCO TAX)

Entry 85 summarizes federal taxes assessed on tobacco products.

In July 2012, Congress amended the federal Internal Revenue Code's definition of "manufacturer of tobacco products." The revised definition adds retailers who, for commercial purposes, provide consumers with access to roll-your-own tobacco machines. These retailers now must pay the same federal excise taxes and comply with the same permitting processes as mass manufacturers. The amendment closes a tax loophole for retailers that allowed consumers to use high-speed machines to produce cartons of cigarettes that were similar to other mass-produced cigarettes. A "manufacturer of tobacco products" does not include a person who sells a roll-your-own tobacco machine to a consumer for personal home use.

Bill Number: Moving Ahead for Progress in the 21st Century Act, H.R. 4348, 112th Cong. Section 100122

Citation: 26 United States Code Section 5702

Effective Date: July 6, 2012

### Changes to Entry 96 (LICENSING PENALTIES FOR SALES-TO-MINORS VIOLATIONS)

Entry 96 summarizes penalties that the state Board of Equalization (BOE) may impose on retailers that violate the Stop Tobacco Access to Kids Enforcement (STAKE) Act.

Assembly Bill 1301 amended Business and Professions Code Section 22974.8 to remove the "trigger language" that allowed the BOE to impose penalties only where the most recent official statewide youth purchase survey finds that 13 percent or more of youth were able to purchase cigarettes. Now, BOE may impose penalties regardless of the rate of illegal tobacco sales to youth. The legislation also amended the penalties that the BOE may impose. If the California Department of Public Health assesses a civil penalty against a retailer for a third, fourth, or fifth STAKE Act violation in a five-year period, the department must notify the BOE of the violation. The BOE must assess a \$250 civil penalty against the retailer

and suspend or revoke the retailer's license according to the following schedule:

- a 45-day suspension of the license for a third violation at the same location within a five-year period
- a 90-day suspension of the license for a fourth violation at the same location within a five-year period
- revocation of the license for a fifth violation at the same location within a five-year period

The BOE must give a retailer at least ten days' written notice of a pending suspension or revocation and an opportunity to appeal the suspension, revocation, and/or civil penalty, but only for the purpose of correcting a mistake or clerical error.

The new law repeals a provision that stated that convictions accumulated against a prior retailer at a retail location are not accumulated against a new retailer at the same retail location.

Bill Number: AB 1301, 2011-2012 Session (Hill)

Citations: California Business and Professions Code Sections 22958, 22974.8

Effective Date: January 1, 2013

### Changes to Entry 121 (PATIENT PROTECTION AND AFFORDABLE CARE ACT)

Entry 121 summarizes the tobacco-related provisions of the federal Patient Protection and Affordable Care Act (ACA). Under the ACA, health insurers in the individual and small group markets are permitted to vary their premium rates on the basis of tobacco use. Specifically, these insurers can charge tobacco users a "surcharge" of up to 50 percent more in premiums than nontobacco users. However, states can choose to limit or prohibit tobacco surcharges.

On May 9, 2013, the Governor signed legislation that would allow insurers in the individual and small group markets to use only age, geographic region, and family size for purposes of establishing premium rates. As a result, in California, these insurers cannot charge an individual a higher premium based on the individual's tobacco use. The legislation does not apply to certain "grandfathered" health care plans that were in effect on March 23, 2010. For all other individual and small group market plans, the



legislation will go into effect for policy years starting on or after January 1, 2014.

Bill Numbers: ABX1 2, 2013-2014 First Extraordinary Session (Pan),  
SBX1 2, 2013-2014 First Extraordinary Session (Hernandez)

Citations: California Insurance Code Sections 10753.14, 10965.9  
Effective Date: January 1, 2014

### New Entry (TRICARE SMOKING CESSATION PROGRAM)

On February 27, 2013, the Department of Defense issued regulations regarding a smoking cessation program under TRICARE, which provides health benefits for military personnel, military retirees, and their dependents. The regulations state that smoking cessation medications are available through TRICARE at no cost to the beneficiary, and that TRICARE covers individual and group cessation counseling. Beneficiaries also have access to a toll-free quit line and web-based resources. Beneficiaries are entitled to two quit attempts per 12-month period. A third quit attempt may be covered with physician authorization.

Citation: 32 Code of Federal Regulations Section 199.4(e)(30)  
Effective Date: March 29, 2013

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